LBH
Kanawha County, WV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MASSEY ENERGY COMPANY AND ITS
SUBSIDIARY, SPARTAN MINING COMPANY
D/B/A MAMMOTH COAL COMPANY

and Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

REVISED INVITATION TO FILE BRIEFS

This case is presently before the Board on the exceptions of Respondents Massey Energy Co. (Massey) and Mammoth Coal Co. (Mammoth, and the cross-exceptions of the General Counsel, to the November 21, 2007 decision of Administrative Law Judge Bogas.[1]

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[1] On September 30, 2009, the two sitting members of the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 354 NLRB No. 83. The Board found the violations alleged against Mammoth, but severed the issue of Massey's liability for this unlawful conduct and reserved it for separate consideration.

On October 7, 2009, the Board filed an application for enforcement in the United States Court of Appeals for the Fourth Circuit. On April 19 and 21, 2010, the court dismissed the application pursuant to the Board's and Mammoth's joint motion.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. V. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained.

In his post-hearing brief to the administrative law judge, the General Counsel argued, inter alia, that Massey and Mammoth were a single employer for purposes of imposing unfair labor practice liability.[2] See generally *Flat Dog Productions, Inc.*, 347 NLRB 1180 (2006) (discussing single-employer test). The judge did not rule on that theory of liability, or on the agency theory that the General Counsel also pursued, but instead found Massey liable on a "direct participation" theory. The General Counsel's cross-exceptions do not challenge the judge's failure to rule on the single-employer theory, nor is that theory argued in the briefs that have been submitted to the Board by the General Counsel.

The Board has not required that cross-exceptions be filed to preserve an alternative theory of violation, when an administrative law judge has relied on another applicable theory and has not passed on the fully-litigated alternative theory. See, e.g., *Pay Less Drug Stores Northwest*, 312 NLRB 972 (1993)(no cross-exceptions filed, but alternative theory was fully litigated and argued in General Counsel's supplemental brief to the Board).

Thus, the case, in its entirety, is before the Board for consideration anew.

[2] The complaint did not allege that Massey and Mammoth were a single employer, but instead alleged that each entity was an agent of the other.

We have made no determination with respect to the issue of the Respondents' individual or joint liability. See fn. 1, supra. Rather, we seek additional briefing, as explained below, to assist the Board's consideration.

The parties are invited to file briefs addressing the following questions:

1. Given the procedural circumstances of this case, does the Board have the authority to consider whether Massey and Mammoth constitute a single employer under existing Board law?

2. If so, should the Board exercise its authority?

3. If the Board can and should consider the single-employer theory of liability, does the existing record in fact establish that Massey and Mammoth constitute a single employer?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C. on or before April 5, 2011. The parties may file responsive briefs on or before April 19, 2011, which shall not exceed ten pages in length. No other responsive briefs will be accepted. The parties shall file briefs electronically at http://mynlrb.nlrb.gov/efile. If assistance is needed in filing through http://mynlrb.nlrb.gov/efile, please contact the undersigned.

Dated, Washington, D.C., March 15, 2011.

By direction of the Board: [3]

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Lester A. Heltzer
Executive Secretary

[3]Member Hayes dissents from his colleagues' decision to invite briefs on the single employer issue. He would decide the case on the record as it stands today, rather than giving the Acting General Counsel an opportunity to make an argument to the Board that his representatives previously chose not to make in cross-exceptions or in answering Respondent Massey's exceptions. Further, Member Hayes would find that the filing of briefs in response to the invitation should not in any way affect the analysis of whether the Board is barred on due process grounds from relying on a single employer theory to impose unfair labor practice liability on Respondent Massey. In particular, Respondent Massey should not be deemed to have waived any due process defense, nor should its opportunity to file a brief be deemed as curing any prior procedural deficiencies in the pleading or litigation of a single employer theory.